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JOHN F. DAVIS,

No. 5 Original

In the Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, PLAINTIFF

v.

STATE OF CALIFORNIA

ON MOTION OF CARL WHITSON FOR LEAVE TO FILE PETITION IN INTERVENTION OR FILE AMICUS CURIAE BRIEF

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION IN INTERVENTION

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington, D.C., 20530.

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Mr. Carl Whitson, as a citizen and taxpayer of the City of Long Beach, California, has moved for leave to file herein a petition in intervention or an *amicus curiae* brief "on behalf of all other taxpayers of like circumstances." While the United States neither consents to nor opposes the motion to file an *amicus curiae* brief, it opposes the motion to intervene on the following grounds:

1. *The motion is not accompanied by a copy of the proposed pleading.*—Rule 9(2) of this Court provides that "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure * * *." Rule 24(c), F.R. Civ. P., requires that a motion for intervention

725-571—64

"shall state the grounds therefor and shall be accompained by a pleading setting forth the claim or defense for which intervention is sought." Without an opportunity to examine the proposed pleading, the Court cannot properly determine whether it should be filed. The present motion is not accompained by the proposed pleading, and for that reason should be denied. *Hirshorn* v. *Mine Safety Appliances Company,* 186 F. 2d 1023 (C.A. 3); *Mullins* v. *De Soto Securities Co.,* 2 F.R.D. 502 (W.D. La.), appeal dismissed, 136 F. 2d 55 (C.A. 5).

2. *The State of California, as* parens patriae, *represents all its citizens as against the United States herein.*—As this Court held in *New Jersey* v. *New York,* 345 U.S. 369, 372–373, in denying the City of Philadelphia leave to intervene to assert its own water rights in the Delaware River when the State of Pennsylvania was already a party to the suit to settle rights in that river:

> The *"parens patriae"* doctrine * * * is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, "must be deemed to represent all its citizens." *Kentucky* v. *Indiana,* 281 U.S. 163, 173–174 (1930). The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

> * * * If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. * * *
>
> Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions. An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state. * * *

Every consideration invoked by the Court there is applicable here. The stated objectives of the movant are to challenge certain positions being taken by the State against the United States, and to interject issues between the State and the City of Long Beach which in no way concern the United States. This would upset orderly procedure and unduly encumber the litigation.

3. *This is not an appropriate case for a taxpayer's suit.*—The movant appears as a taxpayer of the City of Long Beach, "on behalf of all other taxpayers of like circumstances." Motion, pp. 1–2. However, a taxpayer may sue to enforce the rights of a city only when the city itself improperly refuses to do so. *Kentucky-Tennessee Light & Power Co.* v. *City of Paris, Tenn.*, 48 F. 2d 795, 798 (C.A. 6), certorari denied, 284 U.S. 638. Here, where the city could not properly appear because it is represented by the State, it would *a fortiori* be improper for a taxpayer to intervene on behalf of the city or its taxpayers.

4. *No grounds for intervention are shown.*—The movant does not purport to rely on any ground for intervention enumerated in Rule 24, F.R. Civ. P., and none of those grounds appears to be presented by the facts he recites. He makes no claim that he or the city is or may be inadequately represented. Indeed, so far as concerns the dispute between the United States and the State of California, his only point seems to be that the State is claiming too much. Paragraphs 1, 3, Motion, pp. 2–3. In that respect, the interests of the city and the State are identical, and there is no need for separate appearance by the city or by anyone on its behalf. Cf. *Archer* v. *United States,* 268 F. 2d 687 (C.A. 10). The other issues that the movant seeks to interject, concerning rights as between the city and the State, are foreign to the present suit and would only encumber it and unduly delay or prejudice the adjudication of the rights of the original parties.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the motion for leave to file a petition in intervention should be denied.

ARCHIBALD COX,
Solicitor General.

MARCH 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964